MICHIGAN SUPREME COURT

PUBLIC HEARING
MARCH 14, 2002

JUSTICE CORRIGAN: Good morning and welcome to our public hearing this March morning. We have a number of items that have been advertised and persons who have signed up to speak this morning. I'll begin by notifying you that the Court permits speakers 3 minutes and we will do that without interrupting you in your presentation. And whether you're able to continue depends on whether there are questions by the Court on your presentation. So we welcome you and let's begin with Item #99-65. Richard Bisio of the State Bar Civil Procedure Committee has signed up to speak.

Item #1: 99-65:

MR. BISIO: Good morning. I represent the State Bar Civil Procedure Committee. I'm the chair of the committee and the recommendations of the committee that I'm presenting today have also been adopted by the State Bar Board of Commissioners as the State Bar's recommendations. The rules that are before you deal with two different matters, one certification, of seeking concurrence before filing a discovery motion. We support that proposal although perhaps with some misgivings as to whether it would have the intended purpose of encouraging resolution of disputes without court intervention. Based on experience under local rules and Federal Court Rules, we're perhaps somewhat skeptical that this concurrence requirement can change conduct particularly because many judges don't strictly enforce or at least seek out the concurrence question before addressing the merits of motions. But we nevertheless do support the proposal and think it will have a useful effect and in order to encourage the desired effect we would encourage enforcement of this proposal in actual practice through judicial education and perhaps through an opinion in an appropriate case. The other part of the amendment deals with the cost of producing and copying documents and we support that proposal because it does codify existing practice and clarifies who bears the cost of producing and copying documents unless the court orders otherwise. We have also recommended a few minor language changes which were in the letter that I submitted to the Court along with my request for an appearance. Does the Court have any questions.

JUSTICE TAYLOR: I'm curious, this all seems fine when you're dealing with two lawyers. What do you do about a case where you have a non-lawyer representing, that is an *in pro per*.

MR. BISIO: I think it's useful to confer in any circumstance and one can, if there's a sufficient relationship that you can talk to one another--

JUSTICE TAYLOR: Let's assume you don't. Let's take the easiest case. Let's take a divorce case where one of the parties doesn't have a lawyer. What does a lawyer representing one of the parties do in that circumstance on discovery.

MR. BISIO: They can send a letter explaining the nature of the motion and asking for concurrence. That I think would be the minimum and it's probably not going to work but

JUSTICE TAYLOR: Should we put something in the rule about that?

JUSTICE CORRIGAN: Don't they have meet and confer requirements in local rules right now that affect *pro pers* too. How does it work there in the local rules?

MR. BISIO: I don't think the rules distinguish between represented and non-represented parties.

JUSTICE CORRIGAN: Should they?

MR. BISIO: I don't think they should. I think the requirement for seeking concurrence is a good one and that you should attempt, depending on the circumstances, however best you can, to discuss the--

JUSTICE TAYLOR: There was some comment about the "meet" part of this was a problem, the meet and confer. Suggesting that you had to have a head-to-head discussion. Is that a problem do you think. Should we simply say you have to confer so you could pick up the phone. The comments seemed to think that "meet" was a difficulty.

MR. BISIO: The language that's proposed does not require a meeting, it requires a statement that the movant has in good faith conferred or attempted to confer. It doesn't require a face-to-face meeting and although that's perhaps helpful in some cases, generally under local rules the way we do it is by discussion on the phone.

JUSTICE KELLY: The complaint has been made to us that with respect to the copying costs part, this would work a hardship on a party who was seeking discovery from perhaps a prosperous defendant that flooded the requester with documents, maybe many of them unnecessary, or even meant to camouflage the documents that were pertinent and then hit this party with costs of copying.

MR. BISIO: I don't think that would be a problem because the person requesting the documents should be able to decide which documents to copy. The proposed rule will require the person producing to bear the cost of producing all those documents but the person requesting can look at them and decide which are relevant, which they want copies of, and then bear the cost of copying. And the rule is just a presumptive rule and the court can change it if the particular circumstances justify that.

JUSTICE CORRIGAN: Your proposed language says make available versus produce and you think that's clarifying. Can you explain why.

JUSTICE YOUNG: Yeah, I'm curious because I'm not sure what change this makes. I understand the number of entities that are requested these documents, prefer rather than having somebody paw through their original documents, to have them copied. Now unless you can explain to me why producing requires the producer to actually copy and bear the expense of that copying other than for its own preference, I'd like to know what in the current rules requires me, in addition to producing the documents for your inspection, requires me to provide copies to you free of cost to you.

MR. BISIO: The rules don't require that.

JUSTICE YOUNG: So what are we changing and why.

MR. BISIO: We've proposed a change to the proposed language because the word "produce" could be viewed as including a responding party's making copies of the documents if that's how they choose to produce the documents. We want to clarify--

JUSTICE YOUNG: You're saying producing in the rules is insufficiently clear that it not only entails making the documents available for inspection.

MR. BISIO: It could be read as including making copies of the documents. The language as proposed says the expense of producing items will be borne by the responding party. What we simply wanted to clarify is if the party producing the documents chooses to make copies rather than make the originals available, that's an expense that they should bear unless the person receiving the documents wants those copies and says yes I want those copies, then they should bear that expense. Perhaps we didn't articulate that clearly enough but the cost of production, meaning the cost of making things available, ought to be borne by the producing party. If they choose to do that by making copies then they should initially bear that burden. The requesting party, if they want those copies, should pay for the cost of the copies.

JUSTICE CORRIGAN: Anything further. Thank you Mr. Bisio.

Item 2: #98-50

MR. BARTLAM: Good morning. My name is William Bartlam. I'm from the Sixth Judicial Circuit Court in Pontiac. I am a member of the subcommittee of the juvenile rules. That was a subcommittee of the family division rules committee and I wish to talk briefly about the efforts we undertook in presenting this which is our work product to you. These procedural rules were crafted really in 1987 and while they've had amendments in 1988, 1989, 1997 and 1998, essentially the subchapter is 15 years old. The substantive law has changed. The rules have somewhat changed. I would like to remind you that the juvenile justice rules that appear within here were temporary amendments and the personal protection rules that appear in here were issued in advance of comment because the courts were without procedural guidance. Our subcommittee was asked to review not only the rules as they exist today, but the work product of the juvenile rules committee that was submitted to you in 1996. The recommendations of the Childrens Justice Committee, the response of the Juvenile Rules Committee to that, the temporary amendments, the minor PPO rules, the Binsfield legislation and the changes there, and various conflicts--

JUSTICE CORRIGAN: We understand the full scope of the work that was assigned to you. The Justices appreciate the work. You only have 3 minutes Mr. Bartlam. What is your point sir.

MR. BARTLAM: Thank you. Certain of our critics have suggested that we have legislated through these draft rules. We will leave that to your judgment. I would tell you that in the discussions of the subcommittee we were very cognizant of that and we tried very hard not to legislate through rules. We would urge you to adopt them because the rules in this statute are increasingly out of sync with each other, and also to recognize the impact of the federal Adoption and State Families Act, ASFA, because that is real dollars to Michigan and our procedural rules don't reflect some of the requirements of the Code of Federal Regulations.

JUSTICE YOUNG: Has the committee reviewed all of the comments at this point and you're making representing now that notwithstanding these, you want us to act on them now.

MR. BARTLAM: Yes I am.

JUSTICE CORRIGAN: You don't choose to

MR. BARTLAM: May I more specifically answer your question. The committee as a whole has not reviewed all of the comments received. We have reviewed only the comments of Judge North. The other comments that have arrived within the last few days there has not been a committee meeting.

JUSTICE CORRIGAN: Our ordinary practice would be to permit you to respond, I think, and to do clarifications, so we wouldn't directly adopt, I don't believe, give the committee a chance. And I should say on behalf of the Court that the Court is grateful for this work that has gone on for many years in five separate administrative files that we have referred to this committee. We appreciate that this was a gargantuan task so we thank the committee and you for the work.

MR. BARTLAM: Thank you very much.

JUSTICE CORRIGAN: Other comments? Thank you. Cynthia Sherburn.

MS. SHERBURN: Your Honor, (inaudible) I think Mr. Bartlam has covered virtually everything I would say.

JUSTICE CORRIGAN: Very well, thank you. Karen Hamilton. Is Karen Hamilton in the Court? Autumn Rivest. Is Autumn Rivest here? Is there a Frank VanderVort in the Court?

MR. VANDERVORT: Good morning and thank you. My name is Frank VanderVort. I'm the program manager at the Michigan Child Welfare Law Resource Center at the University of Michigan Law School. I'm also currently the chair of the Children's Law Section of the State Bar of Michigan and have practiced in this area of law for 12 years and prior to that worked in child welfare for about 3 years. I submitted to the Court for consideration a 19-page memorandum regarding these proposed rules and I would just direct your attention to that when you have the opportunity. I'd like to speak specifically about three issues that I see as very critically important this morning. First, unlike Mr. Bartlam, I believe that there is legislation offered in these rules. Two specific examples. Court-appointed special advocates. There has been a bill pending in the Michigan Legislature for more than a year to try to adopt court-appointed special advocates. It has never made it out of the committee. It has not made it out of committee because it is not a good idea. Secondly, graduated sanctions in juvenile justice. There is nothing in the statute that requires nor permits the court to consider graduated sanctions, yet these rules suggest that it should be required that graduated sanctions be considered.

And I would suggest to the Court that those are efforts to in fact legislate through court rule. Secondly, the tender years hearing contained in 5.972(C)(2) which permits under certain circumstances a child's statement about abuse to be admitted without the child having to testify in open court. There is a wealth of social science research that suggests that childrens' statements denying child abuse are often not credible. The proposed rule would add that a child's statement denying child abuse or neglect should be admitted just as the child's statement about what happened in terms of abuse or neglect. Again I cited in my memorandum a summary of the social science research that would document that and would ask that the Court carefully consider that matter. And also would indicate to you that FIA, the agency that is responsible to investigate child abuse and the experts in child abuse have in their policy a provision that states clearly that children will oftentimes deny abuse, particularly child sexual abuse in situations where there is clear physical evidence and clear corroborating evidence that the abuse happened. So I would ask the Court specifically to reject the proposed amendment to 5.972(C)(2). My final point is, there are some suggestions in these proposed rules that the court could conduct certain hearings or reviews not on the record and outside the presence of the parties without notice. Specifically, 5.962(B) suggests that the court could simply conduct review hearings without notice to the parties, without opportunity to be heard and without presence of the parties. Your Honors, the cases that we're talking about are cases of juvenile justice where children lose physical liberty and child abuse and neglect where parents lose the right to care, custody and control of their children. These are tremendously important and impactful cases and I don't believe any hearing should be taking place outside of the parties without proper notice and proper opportunity to be heard. That's all I have to offer this morning.

JUSTICE CORRIGAN: Just on the point that you're making Mr. VanderVort, and certainly in terms of due process according to the U.S. Supreme Court, sometimes in emergency settings a hearing can occur after the action. Is that's what's being implemented in those parts of the rules. Are they saying in emergency settings the court can act and then have the due process hearing later.

MR. VANDERVORT: As I understand the proposed rule, particularly 5.962(B), it's a review, Your Honor. It's after action has already been taken.

JUSTICE CORRIGAN: All right, we'll take your points under consideration. Justice Markman.

JUSTICE MARKMAN: I think you've raised a very important point. Would it be inappropriate, Chief Justice Corrigan, if we asked the previous speaker to respond to one of the points made, specifically the matter of the graduated sanctions and

whether or not that engages the committee in legislating.

JUSTICE CORRIGAN: Certainly, we welcome Mr. Bartlam to come back if you care to, sir. We're not compelling you to. And anything further, Mr. VanderVort.

MR. VANDERVORT: I have nothing further Your Honor.

JUSTICE CORRIGAN: Thank you sir for coming this morning.

MR. BARTLAM: The definition of graduated sanctions and the reference to it actually put a name or a label on the practice that occurs. A graduated sanction is for the repeat offender, the person who has had an adjudication and a disposition, typically the probation violator. The probation violator may be, again, continued on probation with further consequences or may have a ratcheted up consequence, removal from home, placement in an institution, requirements to wear a tether. What graduated sanctions, the definition and the availability of graduated sanctions reflects is a practice. We've actually put a label on what occurs. This was a recommendation as part of the juvenile justice recommendations in 1997.

JUSTICE CORRIGAN: That doesn't foreclose the committee's right to respond to this point which is made, I think, very well in Mr. VanderVort's memorandum.

JUSTICE YOUNG: I certainly think, that's why I was anxious today when you said you were urging us to act on this. I'm certainly no expert in this area but there have been a number of comments that have caused me to at least be concerned that the issues commented upon be reconsidered and reconsidered seriously by your committee and I hope that among the more serious ones, those that are at least serving constitutional problems or end running the legislative process where the Legislature has chosen not to act on a particular proposal but our committee has chosen to act on it, the committee will give us an explanation as to why those actions or those proposals are justified.

JUSTICE CORRIGAN: Can you speak to his point on the court-appointed special advocate because that was a powerful point he made that it never made it out of committee and that you adopted it in any event. What's your response on that.

MR. BARTLAM: Our response is that in a number of the courts in Michigan there are court-appointed special advocate programs. They are operating essentially without direction from the courts. There is no reflection of the status of the court-appointed special advocate. The family division rules committee and the juvenile

rules subcommittee asked the childrens' charter to provide us a draft if a CASA were to exist, what would the status of the CASA be, what would the responsibilities of the CASA be and how would the CASA have access.

JUSTICE YOUNG: Is this something that the Court has the authority to do by rule as opposed to the Legislature.

MR. BARTLAM: The courts have neither rule nor statute for court-appointed special advocates, yet they are in use in several Michigan counties.

JUSTICE YOUNG: I guess the question would be then, are they legitimately in use. And I guess the further question is, in the absence of legislation does the Court have, pursuant to its rule-making authority, the constitutional right, and thirdly, is it prudent if we do have the authority.

JUSTICE CORRIGAN: The other point I'd like to ask you about is another point made in there that we are then authorizing the unauthorized practice of law.

MR. BARTLAM: That is one of the concerns that has been addressed with every CASA program is in fact that this is not a second lawyer guardian ad litem, this is not a lay guardian ad litem. That this is an investigator that the court asks to investigate and report and in

JUSTICE CORRIGAN: Why is it entitled special advocate then?

MR. BARTLAM: That is the national program that has existed for approximately 25 years and to which the local programs ascribe, and they follow their procedures and their requirements in terms of training and reporting and we have tried to recognize what is and we have tried to give local courts maximum flexibility in determining in which cases a court-appointed special advocate might be used, the access to records the special advocate might have, and reflecting in fact that this is a non-party. The special advocate doesn't have party status. And in terms of notice and opportunity to be heard, those are concerns. And in crafting the rule, that's how we crafted it.

JUSTICE WEAVER: There are a number of these programs around the state, right.

MR. BARTLAM: Yes there are, and they have been in place for a number of years.

JUSTICE CAVANAGH: There's one here in Ingham County.

JUSTICE WEAVER: They are not lawyers and they are appointed by the courts as I understand it, to bring forward more information and I think you used the word investigator.

MR. BARTLAM: That's correct.

JUSTICE WEAVER: Which is different from being a lawyer or practicing law. So although I suspect there is a variety of types of programs around--

MR. BARTLAM: What we have attempted to clarify through the existence of this proposed rule.

JUSTICE MARKMAN: Your Honor, I would just like to second what Justice Young has indicated with respect, for example, to the graduated sanctions, I hope that in your internal considerations you will not only conclude to your satisfaction that this reflects a current or contemporary practice, but also that that current or contemporary practice has some foundation in the law. Do you have any tentative thoughts on that.

MR. BARTLAM: Yes, Section 18 of the Juvenile Code speaks to the dispositions available to the court and then the following sections speak to subsequent reviews and the ability of the court to enter supplemental dispositions while the juvenile is under the jurisdiction of the court.

JUSTICE WEAVER: Would you clarify for me what the controversy is here about, are the rules, I guess I missed it, proposing that the judges have to follow a certain kind of series of what they can do and can't do. Is that it?

MR. BARTLAM: In terms of the graduated sanctions, there is a definition that is set out, and that is the definition that was provided in the recommendation. The only place where the term graduated sanctions is used is in the disposition rule and the probation violation rule, 5.944. And it says that upon proof of a probation violation the court shall consider graduated sanctions.

JUSTICE WEAVER: Yeah but what, i.e., they cannot do something to them and they have to do something else first, is that this idea.

MR. BARTLAM: That's correct. There is a condition precedent and

JUSTICE WEAVER: But where is that required in the statutes. Most of the judges that I know, and I was a probate judge at one time, had a number of things they could do. They didn't have to do them in order. I understand the federal government has tried to put down some rules as to you can't hold a child for 6 hours or 30 hours and all that. So these rules are trying to put that in, huh?

MR. BARTLAM: These rules are saying that that should enter into a judge's consideration in deciding what to do.

JUSTICE YOUNG: Progressive discipline.

MR. BARTLAM: Progressive discipline, that's correct.

JUSTICE WEAVER: And do they lay out what the various steps are.

MR. BARTLAM: Only in the definition. And

JUSTICE WEAVER: Okay, I'll have to find that part. I suspect you have gotten some response to that.

JUSTICE CORRIGAN: Hundreds of pages of responses, we understand so we want you to have the opportunity to review the criticisms and comments and get back to us.

JUSTICE TAYLOR: What about the point about holding hearings without people being notified.

MR. BARTLAM: The particular rule cited is 5.962. That is the initial procedures upon the filing of a complaint for neglect or abuse of a child. And it indicates that the court will take various matters. If the removal of the child is not requested, there is not a hearing. There is what is called an inquiry. And the inquiry is a paper review. The paper review may go beyond just examining the documents. The individual reviewing them, the court employee, typically a referee, may say I want more information before I take action, before I decide what direction this will take. Will this be a case that is diverted or will this be a case that will be handled through formal proceedings. And in that instance the referee may conduct a conference. The conference, this informal inquiry, is not a hearing and for that reason no record is made. The referee--

JUSTICE TAYLOR: It's okay. I want to know about letting people know who have got an interest in this. What about that point. That was a point the gentleman

from the University of Michigan made.

MR. BARTLAM: In terms of removal from home, the rules require, present procedure requires, and it is unchanged, that there is notice, it is telephonic in many cases because the hearing is occurring within hours of the incident. But there is notice, there is an opportunity to be heard, there is an opportunity for a respondent to have appointed counsel if they don't have counsel of their own.

JUSTICE TAYLOR: Is there some portion of these proceedings--I don't know if we're sort of skirting the issue--this gentleman seems to feel there are proceedings that interested parties don't get notice of. What's he talking about as far as you know.

MR. BARTLAM: As far as I know, the rule he has cited is where documents have been presented to the court and they have asked the court to take subject matter jurisdiction and conduct further hearings and formal proceedings. In that case there is no hearing.

JUSTICE CORRIGAN: So if you can help us, this would be analogous to filing a complaint in a civil case and a determination at that point, and proceedings to follow. Is that correct? And there is a decision made whether there is a formal complaint or it goes some other route is what you're saying.

MR. BARTLAM: Yes. The court actually acts as the gate keeper. The juvenile court acts as the gate keeper in both delinquency and neglect matters.

JUSTICE CORRIGAN: So is that akin, say, in a criminal proceeding to the court determining probable cause or not.

MR. BARTLAM: No. Probable cause would be determined through a hearing with notice, opportunity to be heard and opportunity to have the assistance of counsel.

JUSTICE YOUNG: Would this be parallel then in the criminal context to the complaint and warrant stage where you go before the magistrate and say that these things have happened that are criminal.

MR. BARTLAM: You would do a swear to, yes.

JUSTICE CORRIGAN: So that's what we're talking about here and the

objection is that there has to be a hearing on that piece of it.

MR. BARTLAM: I would have to ask Mr. VanderVort.

JUSTICE YOUNG: Well you have plenty of time apparently to do just that.

JUSTICE CORRIGAN: Thank you Mr. Bartlam. Anything further. Next item is Item 3 and this is our file 01-19. William Ladd, legal aid and defender.

MR. LADD: Good morning Madam Chief Justice and Justices. I would beg the Court's indulgence. I had directed my comments to the prior number, Item 98-50.

JUSTICE CORRIGAN: It's listed as 01-19 here but go ahead and made your comment.

JUSTICE CORRIGAN: Next item is Item 3 and this is our file 01-19. William Ladd, legal aid and defender.

MR. LADD: Good morning Madam Chief Justice and Justices. I would beg the Court's indulgence. I had directed my comments to the prior number, Item 98-50.

JUSTICE CORRIGAN: It's listed as 01-19 here but go ahead and made your comment.

MR. LADD: Thank you. I would merely draw the Court's attention to the proposal as it relates to MCR 5.915 which deals with the lawyer guardian ad litem section or counsel for the child. What this proposal essentially does is eliminate most of the rule as set out by this Court in the previous rule, I would suspect because the writers of the rules thought that the statute which supercedes the rule, MCLA 712.17(D) sets out in great detail what the responsibilities of the lawyer guardian ad litem are. However the rule as this Court has set up already has additional requirements which I think need to be maintained and in fact need to be strengthened. I would draw the Court's attention first of all to the requirement and language in the present rule as it relates to substitution of counsel. And I think that's a particular problem. My practice is in the Wayne County Juvenile Court and while it's just one court, it is between 50-60% of the child protective proceedings in the state and the court there is very willing, and in fact the court is built on the idea of free substitution of counsel which I think subverts the whole intent of the lawyer guardian ad litem statute. This Court has been very concerned about how that statute has been implemented. I know the State Court Administrator's Office has an

evaluation of the implementation of the statute and I think the rule can be used to enforce that statute and strengthen it. And I've offered some suggestions to do so. I think one of the things the Court can do is have a requirement that the trial jurist make an inquiry about whether or not the lawyer guardian ad litem has complied with the requirements of the statute, I think on the record or in writing would be a good way to enforce those requirements and that could be part of the rule. The other thing that I've suggested which I think would be very helpful to, as an attorney representing children and also to the court, in order to be prepared one needs to have the information that is in the hands of the Family Independence Agency or the agencies, and a rule requirement which would be similar to a discovery rule that the lawyer guardian ad litem be provided with reports produced by the agencies involved in the case before the hearings would, I think, help ensure that counsel had the opportunity to be prepared to conduct these hearings and would be knowledgeable about them and I think that would well serve the purpose of the rules. So essentially what I believe the Court needs to do rather than let the rule be silent about those requirements is that the Court should strengthen that rule to make it clear that the court take seriously those responsibilities.

JUSTICE CORRIGAN: Mr. Ladd did you submit these comments in writing to us.

MR. LADD: Yes I did.

JUSTICE CORRIGAN: All right, very well. Thank you.

Item #3: 01-19

JUSTICE CORRIGAN: Judge Ernst, are you here on 01-19 or 01-24.

JUDGE ERNST: I'm here on a very narrow point, and I wish good morning to all of your colleagues, Justices. And that is MCR 6.901(B), the last sentence, which states: "The rules do not apply to a person charged solely with an offense in which the juvenile court has waived jurisdiction pursuant to MCL 712(A)(4), the traditional waiver. And I've had a couple of occasions where I've thought gee whiz, I'd like to take another look at this kid as a juvenile and have been precluded from doing that. And why have I been precluded from doing that. Well, after 20 years you do things a certain way and that's just the way it is. I looked at the statute recently and the statute says, and this is MCL 769.1(3), "Unless a juvenile is required to be sentenced in the same manner as an adult under subsection (1), a judge of a court having jurisdiction over a juvenile shall conduct a hearing at the juvenile's sentencing to determine if the best interests of the public would be served by placing the juvenile on probation and committing the juvenile

to an institution . . .". Now, I read that and I thought gee whiz I've been doing this wrong because the Legislature clearly says except for those in subsection (1) of the sentencing statute, 769, I've got to do a hearing. Well then I made further inquiry and found that the Court of Appeals in People v Cosby, and that's 189 Mich App 461 (1991) and then in 1993 People v Velling and that is a decision of this Court, 443 Mich 23, the Court interpreted the language and in Cosby the court said we are persuaded by the statutory scheme that the Legislature intended that the dispositional hearing requirement of 769.1(3) applied only in cases where circuit court or the recorder's court obtains jurisdiction over a juvenile under the new automatic waiver rules set forth in MCL 600.606. And held that the juvenile before the circuit court for sentencing on a traditional waiver could only be sentenced as an adult. And in Velling I believe Justice Cavanagh was the only member of the current court that was on the Court at the time of Velling and Justice Brickley adopted the Cosby rationale. I had a medical malpractice case a few weeks ago and Lickens v Oakwood Health Care came to my attention. Justice Young wrote that and I believe all of the members of this Court signed on to that, and Justice Young wrote "The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. To do so we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written." Now when I read MCL 769.1(3), to me, and I've been down in the Cedar Swamps too long perhaps, the clear meaning is that that applies to all cases except those capital cases described and enumerated in subsection 1 of that statute. And I considered whether this was, what the court intended or not and subsequent case last year also, a Court of Appeals case, People v Williams, 245 Mich App 427, the Court of Appeals discusses some of the injustice that is potentially reached by this interpretation. And my question to you is should this rule perpetuate the decision of People v Velling or should perhaps the Court take a second look at the language of 769.1(3) and perhaps consider giving it its plain meaning as Justice Young suggests.

JUSTICE CORRIGAN: Judge Ernst, by any chance have you submitted these thoughts in writing.

JUDGE ERNST: I have a brief memo here. It's rather summary but it contains the citations.

JUSTICE CORRIGAN: Terrific. If you could submit that through Corbin Davis it would be helpful and we'll get it into the administrative file and certainly consider your comments here today.

JUDGE ERNST: Thank you. I understand from the State Appellate Defender that they are concerned with this issue. They're looking for another vehicle to

bring this to the Court's attention for reconsideration through an appeal but with the rules concerning appeals from pleas, guilty pleas, they're having a great deal of difficulty and as I said, as a sentencing judge I really think that I and my colleagues would enjoy the opportunity to at least take a second look at these offenders.

JUSTICE WEAVER: The proposed rules you find it at 6.901(B).

JUDGE ERNST: 6.901(B), the last sentence. Now that is not a change, Justice Weaver

JUSTICE WEAVER: Right, but it is seemingly the issue.

JUDGE ERNST: And I think elimination of that would let the court apply the statute as it is written and I don't think it would be a great inconvenience to circuit judges. Certainly I don't have that come up very often. Thank you.

Item #4: 01-17:

MR. BISIO: Thank you. Once again I'm appearing on behalf of the State Bar Civil Procedure Committee. The amendment before you on this item is to eliminate the option of filing papers directly with a judge. We recommend against that amendment. I would note first that judges' acceptance of papers under the current rule is discretionary, but the ability to file papers with the judge can be important in two instances--first when court proceedings are occurring at a time when the clerk's office is not open, such as when a hearing or trial runs late in the day or when there's a weekend hearing. And secondly, in the unusual circumstance where's it's necessary to approach a judge outside normal court hours for emergency relief. We believe the rule should preserve the present flexibility to permit the judge to accept papers for filing apart from the normal practice of filing papers with the court clerk. And if the concern that prompted this rule is that papers filed with the judge don't always get into the court file and become a proper part of the record, we would recommend that the text be changed so that the person who files the papers, rather than the judge, as under the current text, assures that the papers are ultimately filed with the court clerk and become part of the record.

JUSTICE CORRIGAN: This is a very troubling situation to me and it did arise out of a case where a person's appellate rights were prejudiced because the judge failed to forward the documents to the clerk, so the appellate rights of the individual litigant were prejudiced because of calculating the claim of appeal or application for leave, I don't remember precisely what it was. And the other obstacle, I suppose, is that there could be favoritism expressed in whose papers you forward and whose you don't.

JUSTICE KELLY: What would you think of a rule that required the person seeking to file papers with a judge to file duplicate copies with the clerk at the first available moment. I think that would be a good idea and that was the intention of our alternative language. It didn't say at the first possible moment.

JUSTICE YOUNG: Can I just ask mechanically. The only time this matters whether the judge, under the current rules, whether the judge gets the papers in, if they never get there or if they get there to the clerk and they get logged in by the clerk later than a specific deadline that they were supposed to be gotten in. And I guess I'm wondering how your proposal avoids the peril of filing with a judge who may or may not get the papers in or may get them into the clerk at a later point without specifying when they were actually served on the judge.

MR. BISIO: If the precise time that the papers were filed is important, I would think that if the clerk cannot date the papers at the time they were filed with the judge, which is probably the case, some type of affidavit from the filing party should complete the record as to when the papers were precisely filed.

JUSTICE YOUNG: Really. So we now get parties attesting to something as critical as when a paper was filed.

MR. BISIO: Well we're dealing with a situation that's not going to happen too frequently but if the judge doesn't mark the papers at the time they were filed, there has to be some way to supplement the file to show when they were filed, if that is a critical point.

JUSTICE CORRIGAN: I don't see how the alternative you proposed is any different from the amendment because we're saying you have to file it with the clerk in the amendment and you're saying you have to file it with the clerk as soon as you can but you can also give it to the judge. But the giving it to the judge is effectively meaningless in terms of the things that we care about. In terms of computation of time, it's got to go through the clerk of the court.

MR. BISIO: The amendment would eliminate the possibility of filing it with the judge and meeting that time requirement.

JUSTICE YOUNG: You can serve it on the judge, you just can't file it with the judge.

MR. BISIO: But if filing is the crucial act in terms of the time that we're talking about, then you don't have that opportunity, and if filing is necessary, for example, during a hearing and the clerk's office is not open, what else can one do.

JUSTICE YOUNG: The question is, how does your proposal lead to any greater certainty about when something is filed.

MR. BISIO: It really doesn't address that. The main thrust of our comment was to preserve the opportunity to file with the judge.

JUSTICE YOUNG: I know, but preserving the opportunity adds uncertainly, it seems to me. If you are lulled into believing that filing a paper as opposed to serving a paper on the judge is a potential effective way of filing with the court, that way leads to more uncertainty, it seems to me. If it's quite clear that in order to file a paper it must be filed with the clerk, then you know what the answer is. If it's possible for a judge to accept a filing and yet it not get placed in the court file and documented as filed when it was filed, then everybody is a little more insecure aren't they.

MR. BISIO: Yes, they are. And I guess we're talking about balancing the opportunity to file with the judge at a time when it's not possible to file with the clerk, and the inherent uncertainty that goes along with that versus eliminating that possibility so that although you have certainty you don't have the flexibility of filing in those fairly rare instances when it's necessary. Now perhaps one way of dealing with that would be to require that the court have a deputy clerk available to log the papers in if they're filed with the judge.

JUSTICE YOUNG: Or you can simply say that if you file with a judge you bear the risk of loss that you don't get your paper filed in a timely fashion.

MR. BISIO: One could say you need to serve it on the judge and then file a proof of service and then file it with the court clerk at the first opportunity thereafter.

JUSTICE CORRIGAN: But as a practical matter, can't you just give it to the judge in any event. In all the cases you're talking about where the judge keeps you late, what is the time constraint in that particular situation that would preclude you from filing it the next morning with the clerk.

MR. BISIO: There may not be any.

JUSTICE CORRIGAN: All right, so you want the convenience of giving

a copy to the judge of let's say, requested jury instructions or a motion, but where time isn't particularly critical in the course of the trial that's running over, right.

MR. BISIO: Where time isn't critical this isn't a problem.

JUSTICE CORRIGAN: Okay. I'm having trouble thinking of the circumstance where you would have to go to the judge's house in the middle of the night or--can you help me out because I'm trying to weigh the two things and it seems to me that when you're looking at the prejudice from the case not being filed timely and the thousands of appeals that there are, and the problem of the emergency setting, you're saying that we should all be driven by this hypothetical emergency, and I'm seeing greater prejudice in the circumstances where your appeal rights are deprived, so I'm having trouble how you cut the balance the way you did.

MR. BISIO: I don't have a specific example for you, Justice Corrigan. I guess the filing of a

JUSTICE YOUNG: Motion for reconsideration. It has a definite period that it has to be filed in. You choose to file it with the judge as opposed to the clerk. Who should bear the risk of loss if the judge doesn't get it down and time stamped at the right time in the clerk's office.

MR. BISIO: It would seem in that situation you have the 10 days or whatever it is, 14 days, to file that and you should have been able to get it to the clerk's office at the time--

JUSTICE CORRIGAN: Yeah, that's just rife with abuse. If you can run upstairs and find Judge X and they're still in the office at 5:05 and besiege him to take your filing on a motion for reconsideration, that's just rife with abuse, isn't it.

MR. BISIO: It is, but the provision in the current rule that gives the judge discretion, I think should deal with that. Judges should consider the circumstances.

JUSTICE YOUNG: Judges get pleadings mailed into them too. So you bear the risk that maybe the judge won't exercise the discretion. I'm trying to figure out--I understand the desire for flexibility but I'm searching for why, when a party fails to file the pleading with the court clerk, which is the entity we rely upon as creating the record that establishes filing dates, etc., a rather critical if pedestrian function, usually not one that judges perform, why we should blow a hole in that system and create the unreliability of judges maybe getting it down in time or not. Not that judges aren't conscientious about

these things but that's not their primary function.

MR. BISIO: I understand your concern Justice Young. And the question is balancing the flexibility versus the certainty. I can't give you a specific example where the flexibility is absolutely required. It ought to be a matter that is left to the discretion of an individual judge whether to permit those types of filings.

JUSTICE CORRIGAN: All right. Anything further?

Item #5: 01-24:

MR. MCMORROW: Good morning, Your Honors. I'm before the Court in my role as a member of the appellate practice section counsel to speak upon the proposed rules amendments to 6.302 and 6.425. As an initial matter let me say that because of miscommunication within the appellate practice section counsel, we did not timely submit a letter, but we are submitting one. I don't know if you have one yet. You will be getting it if you don't and I've asked you to consider what we say in that letter. Basically the problem that we see is that there are some situations in which the proposed rules are going to be asking judges to give advice which is inaccurate. The proposed rule would have a judge advise a defendant who pleads guilty that if the defendant pleads guilty he will not be entitled to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other post-conviction remedies. There are some situations where that is not true. First of all, if the sentence exceeds the guidelines by statute, the defendant has the right to have an attorney appointed to assist him in the preparation of an application for leave to appeal. Secondly, if the prosecutor seeks to appeal, then the defendant will have the right to have counsel appointed.

JUSTICE CORRIGAN: Can you just clarify this for me. Is what is in front of us in addition to--we already amended the rules to put that in, didn't we. We already amended the rules earlier to include exactly what you're saying in the draft rules. Isn't this just an add-on that the MJA has proposed for further clarification. You think this is a total replacement so that we're not giving any of the statutory exceptions.

MR. MCMORROW: Yes, because the proposal I see, under 6.302(B)(6) and (7) you scratched out the circumstances.

JUSTICE CORRIGAN: Okay, well I'll have to clarify that. I think the earlier version didn't talk about waiver. No?

MR. MCMORROW: Oh, no, the earlier revision did not and what you

are doing in your proposal here makes sense in light of your incorporating language that specifically is contained in 770.3(A) which requires that a defendant be advised of his waiver but the advice that's given is, under the statute it says that

JUSTICE YOUNG: It's too broad, you think.

MR. MCMORROW: Yes. I think what you propose is too broad. I also think it's easily correctable and we've made a suggestion as to what you can do to correct it. Our suggestion is that you include language that says that if this is not a conditional plea, the court shall also advise the defendant that if a plea is accepted and the sentence is imposed within the guidelines, that there will be a waiver, etc. So we propose language that I think will address this. Now maybe what's happened is that the answer is that you don't scratch the language that according to the proposal is supposed to be scratched. That might be part of it.

JUSTICE CORRIGAN: Okay. Let me ask you this. Do you have to go through that laundry list if it's not relevant.

MR. MCMORROW: The problem is he won't know that it's not relevant.

JUSTICE CORRIGAN: Why won't the judge know.

MR. MCMORROW: The judge will not know until he sentences whether the judge is going to sentence within the guidelines.

JUSTICE CORRIGAN: Okay, well taken.

JUSTICE MARKMAN: So you're saying basically we can't respond to what the circuit judges have argued is the problem here, that they have to go through this laundry list of things that are only rarely going to be relevant to a case. You're saying we lose the requisite specificity by doing that.

MR. MCMORROW: Oh, yes, and what you end up doing is you end up with a rule where 98% of the time at least--well let me speak for Kent County--98% of the time it will be absolutely, completely, totally accurate but 2% of the time it will not be.

JUSTICE CORRIGAN: Thank you. Anything further. That concludes our public hearing for this morning and this Court stands adjourned until our next oral argument. Thank you.